Supreme Court U.S.
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No. 96-1400

In The

Supreme Court of the United States

October Term, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,

Petitioner,

vs.

DEEP SEA RESEARCH, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. This is an *in rem* admiralty action brought by Respondent Deep Sea Research, Inc. against the shipwrecked vessel *The Brother Jonathan*. Petitioner State of California, State Lands Commission, intervened and moved to dismiss the case, citing a federal statute (the Abandoned Shipwreck Act, 43 U.S.C. § 2101 *et seq.*) which divests the federal courts of their admiralty subject matter jurisdiction over suits involving shipwrecks that meet each of the criteria enumerated in the statute. Under these circumstances, did the district court violate the Eleventh Amendment to the United States Constitution by convening an evidentiary hearing to determine whether the shipwreck at issue meets the criteria set forth in the statute?

2. Did the district court and the court of appeal clearly err in their factual findings that the shipwrecked vessel *The Brother Jonathan* is neither abandoned nor embedded in the submerged lands of the State of California, and thus, that the Abandoned Shipwreck Act does not apply here?

3. Does the Abandoned Shipwreck Act preempt a state law that directly conflicts with its provisions?

PARTIES TO THE PROCEEDING

In addition to those listed in the caption, the parties below included the *in rem* defendant *The Brother Jonathan*, her appurtenances, furniture, tackle, and cargo, as well as the intervenor United States of America.

RULE 29.6 STATEMENT

Respondent Deep Sea Research, Inc. is a closely-held California corporation. It has no publicly-traded stock. It has no parent, subsidiary, or affiliate companies.

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INTRODUCTION

Respondent Deep Sea Research, Inc. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 102 F.3d 379. The opinion of the district court, which was affirmed by the Ninth Circuit, is reported at 883 F. Supp. 1343. Because both the district court and the Ninth Circuit correctly concluded that this *in rem* suit is not an action "against a State," the Eleventh Amendment does not apply here and there was no error below. Accordingly, no significant legal issue is presented for review by this Court. Contrary to the petitioner's suggestion, there is no conflict between the holding below and the Seventh Circuit's holding in *The Lady Elgin*, as that case is clearly distinguishable. Finally, because the decision below turns on its unique facts, it sets no sweeping precedent and implicates no issues of national importance warranting review by this Court. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

1. a. DSR, And Its Discovery Of *The Brother Jonathan*. Respondent Deep Sea Research, Inc. ("DSR") is a small, closely-held California corporation. The principals of DSR have been searching for the shipwrecked vessel *The Brother Jonathan* for more than 20 years. Their persistence was finally rewarded when, in October of 1993, they discovered the wreck resting on the ocean floor beneath several hundred feet of water, approximately 4 ½ miles off the coast of Crescent City, California. It is entirely undisputed that DSR was the first finder of *The Brother Jonathan*. Until DSR discovered the wreck, neither the State of California nor anyone else knew its location, and the State had never made any attempt to locate it. *See Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 382 (9th Cir. 1996); Pet. App. A4.

Since the discovery, DSR has retained a professional archaeologist, and under his supervision DSR has meticulously studied, mapped, and videotaped the wreck using the latest available technology. DSR has also recovered a number of artifacts from the wreck, which have been carefully preserved and restored by an internationally-renowned artifact conservation laboratory and are now on loan to a local museum for the public to enjoy. *See* Memorandum and Order Denying the State's Motion for Stay, attached hereto as Appendix A at Resp. App. 6a-7a, 11a, 15a.

This effort has not been inexpensive. The expenses incurred by DSR to date in locating the wreck, mapping and photographing it, and recovering and treating the artifacts significantly exceed one-half million dollars. This funding has come piecemeal from almost 100 individual investors, mostly people of modest means — plumbers, mechanics, small-business owners, and others. To date, these investors have yet to see a single penny of return on their investment.

No funding has been provided by the State of California or any other governmental entity. Although the State touts itself as a guardian of *The Brother Jonathan*, the State admits the State has done *nothing* to protect the wreck. Indeed, it has neither the resources nor the technological capability to recover the wreck, to preserve its artifacts, or even simply to safeguard it from vandals and pillagers. *See* Memorandum and Order Denying the State's Motion for Stay, attached hereto as Appendix A at Resp. App. 12a-15a. Rather, it is DSR who has taken measures to safeguard the wreck and to preserve its historical values. *Id.*

b. DSR Obtains An Ownership Interest In The Wreck. DSR's historical research revealed that several insurance companies paid claims for loss of the vessel and its cargo shortly

after the sinking. Those insurance companies took title to the wreck by operation of law, under the principle of subrogation. The two insurance companies that paid the lion's share of the claims on the wreck assigned their title to DSR by a written contract, which is part of the record below. In that contract, the insurance companies *represented and warranted to DSR that they had not abandoned their title to the shipwreck prior to assigning that title to DSR.* Accordingly, DSR now holds an ownership interest in the wreck.

c. DSR's *In Rem* Admiralty Action. DSR brought this *in rem* admiralty action against *The Brother Jonathan* in the United States District Court for the Northern District of California, seeking to establish its title to, and its salvage rights in, the wreck. The State of California is not named in the complaint. The complaint does not pray for any injunctive relief, damages, or other award of any kind against the State.

The law of salvage is of ancient vintage. *See* Gilmore & Black, *The Law of Admiralty* 532-33 (2d ed., 1975). Under the law of salvage,

> compensation [is] allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of ship wreck, derelict or recapture.

The Sabine, 101 U.S. 384 (1880). *See also Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 459-460 (4th Cir. 1992), *cert. denied,* 507 U.S. 1000 (1993); *Nunley v. M/V Dauntless Colocotronis,* 661 F. Supp. 1096, 1107 (E.D. La. 1987) (quoting *The Sabine, supra*). Under the law of salvage,

the original owner of the imperiled vessel retains title thereto, but the salvor is entitled to a very liberal salvage award from the *res* of the vessel. *Columbus-America Discovery Group*, 974 F.2d at 459. The courts have recognized that liberal salvage awards further the fundamental public policy of encouraging salvage and recovery efforts, and rewarding those who engage in laborious, costly, and potentially dangerous undertakings.[1]

1. *See Rickard v. Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y., 1968); Gilmore & Black, *supra*, at 532 (citing numerous cases).

Despite its ancient origins, the law of salvage has readily evolved to meet modern concerns regarding preservation of historic shipwrecks. Because the salvor essentially acts as an agent of the district court in recovering the wreck and bringing it into the jurisdiction of the court, district judges have broad discretion both in the initial selection and appointment of the salvor, and later, in deciding the amount of the salvor's award. The district courts have exercised that discretion to ensure that the historical values of antiquated shipwrecks are preserved in the salvage process. For example, in *MDM Salvage, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310-311 (S.D. Fla. 1986), the district court denied the applications of two different commercial salvors to recover property from a Spanish galleon, noting that neither firm had attempted to preserve the "archaeological integrity" of the wreck. The court noted that, "These factors constitute a significant element . . . to be considered when exclusive salvage rights are sought." *Id.* at 310. *See also Columbus-America Discovery Group*, 974 F.2d at 468 (where the court made clear that the salvor's fidelity to archaeological values is among the elements to be considered in determining the amount of the salvage award).

In appointing DSR exclusive salvor of *The Brother Jonathan*, the district court in this case made a factual finding that DSR has undertaken adequate measures to preserve the wreck's archaeological and historical value. *See* Pet. App. A53-A54. In a subsequent Order, the district court made a further factual finding that:

> DSR has committed itself to conducting its salvage

(Cont'd)

By operation of law, the salvor has a maritime lien against the *res* of the recovered vessel and its cargo. *See* Gilmore & Black, *supra*, at 628, and cases cited therein. The salvor enforces the lien by bringing an *in rem* action in federal court against the vessel and its cargo. *See* Supplemental Admiralty Rule C (1)(a). As explained by Chief Justice Taney in the case of *Houseman v. The Cargo of The Schooner North Carolina*, 40 U.S. (15 Pet.) 40 (1841), *in rem* salvage actions against vessels fall squarely within the *exclusive* admiralty jurisdiction of the federal courts conferred under Article III, Section 2 of the United States Constitution:

> Now, the matter in dispute, is merely a question of salvage .... Upon such questions, there can be no doubt of the jurisdiction of a court of admiralty; nor of its authority to proceed *in rem*, and attach the property detained. The admiralty is the only court where such a question can be tried; for what other court, but a court of admiralty, has jurisdiction to try a question of salvage?

(Cont'd)

> operations in an archaeologically sound manner, under the on-site supervision of a qualified, experienced marine archaeologist, and in accordance with a detailed salvage plan designed to maintain the historical value of the vessel.

See Resp. App. 11a. The district court also warned that "the amount of any recovery that DSR may ultimately receive as a salvage award, will be contingent upon DSR's preservation of the historical and archaeological value of the *Brother Jonathan* and its cargo." *See id.* at 11a.

Thus, modern admiralty law in general, and as applied to this case in particular, provides ample incentives and safeguards for the appropriate treatment of historic shipwrecks.

Id. at 48. *See also Madruga v. Superior Court of California*, 346 U.S. 556 (1954); *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1063-1064 (1st Cir. 1987) (*in rem* action for salvage award against artifacts recovered from antiquated shipwreck is governed by general federal maritime law, and is within the federal courts' exclusive jurisdiction); *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 548 (S.D. Fla. 1982) (same).

Because this is an *in rem* salvage action against a vessel, it falls squarely within the exclusive admiralty jurisdiction of the federal courts.

d. The State Of California Intervenes. Although the State was not named in the complaint, it intervened in the action and moved to dismiss on the basis that the suit contravenes the Eleventh Amendment. The State alleged that it owns the shipwreck under the Abandoned Shipwreck Act ("ASA"), 43 U.S.C. § 2101 *et seq.*, and California Public Resources Code section 6313 ("Section 6313"), and that for this reason DSR's *in rem* action is actually an action "against the State" barred by the Eleventh Amendment. The United States also intervened, but for the sole purpose of defending the constitutionality of the ASA; it took no position on the Eleventh Amendment issue.

2. a. The Abandoned Shipwreck Act. By its terms, the ASA applies only to shipwrecks that meet each of the following criteria:

> 1. The shipwreck must be "abandoned"; and
>
> 2. The shipwreck must be located on "submerged lands of a state;" and

> 3. The shipwreck must be either embedded in the sea floor, or be listed in (or determined by the Secretary of Interior to be eligible for listing in) the National Register of Historic Places.

See 43 U.S.C. § 2105(a). In enacting ASA, the federal government asserted title to all shipwrecks that meet each of the above-enumerated criteria. *Id.* The federal government then conveyed that title to the states on whose submerged lands such shipwrecks are located. *See* 43 U.S.C. § 2105(c). Thus, in enacting the ASA, the federal government exercised its sovereign prerogative to claim title to shipwrecks that meet the criteria spelled out in the Act, and then conveyed that title to the states on whose submerged lands the wrecks are located. *See* 1988 U.S.C.C.A.N. 367 & 375. The ASA specifies that title to such shipwrecks shall no longer be determined under the federal common law of salvage; however, federal salvage law shall continue to apply to wrecks that do not meet the criteria spelled out in the Act. *See* 43 U.S.C. § 2106(a) & (b).

The ASA effectively divests the federal courts of their admiralty *in rem* jurisdiction over wrecks that meet the Act's criteria. *See Zych v. The Seabird*, 941 F.2d 525, 530 (7th Cir. 1991). However, the ASA makes equally clear that the federal courts retain their admiralty jurisdiction over shipwrecks that do not meet the criteria set forth in the Act. *See* 43 U.S.C. § 2106(b) ("This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies."). Thus, Congress cautioned that it

> intend[ed] to carve out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies. All other shipwrecks . . . remain subject to the uniform principles of admiralty

law, except as may be provided in other federal law.

Abandoned Shipwreck Act of 1987, H.R. Rep. 100-514(II), 100th Cong., 1st Sess. 2, 1988 U.S.C.C.A.N. 365, 377.

b. California Public Resources Code section 6313. California Public Resources Code section 6313 purports to vest the State of California with title to "all abandoned shipwrecks and all archaeological and historic resources on or in the tide and submerged lands of California." Calif. Pub. Res. Code § 6313(a). The statute further provides that all shipwrecks that have been on the State's submerged lands for more than 50 years shall be presumed to be archaeological and historic resources, and thus shall belong to the State — apparently even if not abandoned. *See* § 6313(c). Unlike the ASA, section 6313 is not limited only to wrecks that are embedded in the sea floor or listed in the National Register of Historic Places.

3. a. The district court Convenes An Evidentiary Hearing To Determine Whether The ASA Applies To *The Brother Jonathan*. Because the parties disputed whether *The Brother Jonathan* meets the criteria set forth in the ASA and California Public Resources Code section 6313, it was necessary for the district court to convene an evidentiary hearing on that issue. Indeed, even the federal government recognized the need for an evidentiary hearing, noting that "[s]everal key factual issues must be resolved in order to determine whether the ASA even applies to the *Brother Jonathan*." *See* May 31, 1994 Memorandum Of The United States in Support of Constitutionality of the Abandoned Shipwreck Act, at p. 6 (not reproduced in appendix).

Accordingly, the district court convened two evidentiary hearings in order to determine whether *The Brother Jonathan*

meets the criteria set forth in the ASA and section 6313. The district court later explained that "[t]he purpose of the two hearings was not to determine the merits of any party's claim to the *Brother Jonathan*, it was simply to determine whether the ASA and California Public Resources Code section 6313 apply to the *Brother Jonathan*," and thus, whether the district court had jurisdiction to proceed in the matter. *See* Pet. App. A24 & n. 3. The district court recognized that if *The Brother Jonathan* meets the criteria set forth in the ASA, the court would have no jurisdiction over the matter; and the court explained that it "has the jurisdiction to hear matters that decide its own jurisdiction." *See* Reporters' Transcript of September 9, 1995 Hearing, at p. 10:6-8 (not reproduced in appendix).

The first hearing was held on September 9, 1994 — *more than two years after the State intervened in the action*. At that hearing, California did not present a single witness or other item of evidence showing that *The Brother Jonathan* meets any of the criteria set forth in the ASA or section 6313. This was despite the fact that the State had more than two years to conduct discovery, investigate the facts, and otherwise prepare for the hearing. Nevertheless, the district court continued the matter until September 27, 1994 to give the State an additional opportunity to present evidence on the question of whether *The Brother Jonathan* shipwreck meets the criteria set forth in the ASA and section 6313.

At the September 27 hearing, the State presented live testimony from several witnesses including a professional historian and a Senior California State Archaeologist. Although DSR did not present any live witnesses at the hearing, it did file multiple declarations and other documentary evidence *four months* prior to the hearing. These included declarations from a marine archaeologist, a marine geologist, several salvage experts, a diving and underwater technology expert, and sonar

and navigational experts — all of whom stated that *The Brother Jonathan* does not meet the criteria set forth in the ASA. The State did not depose any of the declarants, nor did it subpoena any of them to testify at the hearing — despite the fact that California had the declarations in its possession for fully four months prior to the hearing.

After hearing all of the evidence, the district court issued a comprehensive, 50 page memorandum and order denying the State's motion to dismiss. The district court concluded that the evidence showed overwhelmingly that the shipwreck was not abandoned, not embedded in the sea floor, and not listed in or determined eligible for listing in the National Register of Historic Places.[2] Accordingly, the district court concluded that because the shipwreck does not meet the criteria set forth in the ASA, California has no claim to the wreck under the ASA and this *in rem* action is not barred by the Eleventh Amendment as an action "against a state." *See* Pet. App. A29-A44. The court also ruled that California Public Resources Code section 6313 is preempted by the ASA, to the extent that it purports to grant California title to, or regulatory authority over, a class of shipwrecks broader than that encompassed by the ASA. *See* Pet. App. A44-A47.

Thereafter, the district court issued an order appointing DSR custodian and salvor of the wreck. *See* Pet. App., at A60-A61. *However, the district court specifically declined to decide the issue of title to the wreck. See id.* at A61. ("The court does not at this time make any Order as to . . . title to or distribution of any artifacts recovered from the wreck.").

b. Appeal To The Ninth Circuit. The State of California

2. It is undisputed that the State did not even petition the appropriate agencies to list the *Brother Jonathan* in the National Register of Historic Places *until after it filed its notice of appeal to the Ninth Circuit in this case.*

then appealed to the Ninth Circuit (the panel consisting of Judges Kozinski, D.W. Nelson and Schroeder), which unanimously affirmed in a published opinion. *See Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379 (9th Cir. 1996); Pet. App. 1.

The appellate court agreed that California Public Resources Code section 6313 is preempted to the extent that it purports to vest the State with title to shipwrecks not encompassed by the ASA. The court explained that Congress, in enacting the ASA, made clear that the states receive title from the federal government to only those shipwrecks meeting the criteria spelled out in the Act; title to all other shipwrecks continues to be governed by federal admiralty law and such shipwrecks remain subject to the exclusive admiralty jurisdiction of the federal courts. *See Deep Sea Research, Inc.,* 102 F.3d at 384; Pet. App. A8. Accordingly, section 6313 is preempted to the extent that it purports to give the State title to shipwrecks that do not meet the requirements of the ASA. *See id.*

Turning to the Eleventh Amendment issue, the Ninth Circuit held that the district court had properly required the State to prove that the ASA applies to *The Brother Jonathan*. The appellate court explained:

> [A] federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction. [citations]. Therefore, it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan*, *i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case. Otherwise, as DSR points out, the State could receive immunity simply by asserting that it

> was entitled to it. For a federal court to renounce jurisdiction over an admiralty case on the basis of a mere assertion of entitlement to immunity on the part of the State is inconsistent with the court's duty to assess whether it has jurisdiction.

Deep Sea Research, Inc., 102 F.3d at 386; Pet. App. A11-A12.

The Ninth Circuit also addressed the State's assertion that the district court erred in considering the merits of the State's claim to *The Brother Jonathan* in the context of its Eleventh Amendment analysis: "We find that . . . the party asserting immunity has the burden to establish that it is entitled to immunity even if the determination of that issue touches the merits of the claim." *Id.* at 387; Pet. App. A13. The appellate court also explained that the district court did not adjudicate the State's rights in the course of determining whether *The Brother Jonathan* meets the criteria spelled out in the ASA:

> The ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal* government may assert title to such wrecks. *See* 43 U.S.C. § 2105(a). Only after the federal government takes title to the abandoned shipwreck may title then be transferred to the state. 43 U.S.C. § 2105(c). Thus, a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment.

Id.; Pet. App. A13-A14 (emphasis in original; footnote omitted).

Finally, the Ninth Circuit concluded that the district court did not clearly err in finding that *The Brother Jonathan* was not "abandoned" for purposes of the ASA. The appellate court noted that abandonment could be found either by an express renunciation of title by the owner, or by circumstances giving rise to an inference that the owner has relinquished title — such as the passage of time without any effort on the owner's part to recover the wreck. *Id.* at 387-88; Pet. App. A15. The Ninth Circuit concluded that the district court had properly found that neither test was met here. There was no evidence of any express renunciation of title by the original owners or their insurers; and furthermore, the circumstances did not permit an inference of abandonment. The appellate court noted that several insurance companies paid claims for loss of the wreck, and they took title by subrogation. There was no evidence that those insurance companies did not attempt to recover the wreck or otherwise engage in conduct giving rise to an inference of abandonment. *Id.*; Pet. App. A16-A17. Furthermore, in light of the undisputed evidence showing that the technology necessary for locating and recovering the wreck was not available until very recently, the insurers' failure to locate or recover the wreck in the years since its sinking could not support an inference of abandonment. *Id.* Given this evidence, the Ninth Circuit concluded that the district court did not clearly err in finding that the wreck was not abandoned.

The Ninth Circuit also rejected the State's argument that the allegedly uninsured portions of the wreck should be deemed abandoned:

> We decline to divide the wreck of the *Brother Jonathan* into abandoned and unabandoned portions for purposes of the ASA for two reasons. First, if we were to find that the vessel had been partially abandoned, both the

federal court and the state court would be adjudicating the fate of the *Brother Jonathan*. It is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA.

Second, such an approach is inconsistent with the general rule in maritime law of treating wrecks as a legally unified *res*. . . .

Having concluded that the *Brother Jonathan* should be treated as a unified *res*, the question remains, should the wreck be considered abandoned . . . or should the vessel be considered not to have been abandoned . . . ? Because the law is reluctant to find abandonment [citation], and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum, we hold that the *Brother Jonathan* was not abandoned. We reserve the question of whether there is some point at which the portion of the wreck that is insured becomes so negligible that the wreck might be considered abandoned for the purposes of the ASA.

Id. at 102 F.3d at 388-89; Pet. App. A18-A19.

California's Subsequent Petition For Rehearing And Suggestion For Rehearing *En Banc* Was Denied By The Full Ninth Circuit. A timely Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT DID NOT VIOLATE THE ELEVENTH AMENDMENT BY CONVENING AN EVIDENTIARY HEARING TO DETERMINE WHETHER *THE BROTHER JONATHAN* MEETS THE CRITERIA SET FORTH IN THE ASA.

The State of California intervened in this *in rem* admiralty action and moved to dismiss the case, citing the Abandoned Shipwreck Act. The ASA applies only to shipwrecks that meet each of the criteria enumerated in the Act. The wreck must be: 1) "abandoned"; 2) located on "submerged lands of a state;" and 3) either embedded in the sea floor, or listed in (or determined by the Secretary of Interior to be eligible for listing in) the National Register of Historic Places. *See* 43 U.S.C. § 2105(a). If a wreck meets each of these criteria, several consequences follow. First, the federal government asserts title over the wreck. *See* 43 U.S.C. § 2105(a). Second, the federal government transfers its title to the state in whose waters the wreck is located. *See id.* Finally, the federal admiralty laws of salvage and finds do not apply to the wreck, and the federal courts have no *in rem* admiralty jurisdiction over it. *See* 43 U.S.C. § 2106(a); *Zych v. The Seabird*, 941 F.2d 525, 530 (7th Cir. 1991). Conversely, if a wreck does not meet each of the criteria set forth in the ASA, it continues to be subject to the *in rem* admiralty jurisdiction of the federal courts, and title is decided by the federal courts under the traditional admiralty laws of salvage and finds. *See* 43 U.S.C. § 2106(b); *The Seabird*, 941 F.2d at 530.

Here, the State asserted that it owns *The Brother Jonathan* under the ASA and that accordingly this case is barred by the Eleventh Amendment as an action "against a state." Application

of the ASA criteria turned upon disputed issues of fact. Accordingly, it was necessary for the district court to convene an evidentiary hearing to determine those issues. The district court explained that "[t]he purpose of the two hearings was not to determine the merits of any party's claim to the *Brother Jonathan*, it was simply to determine whether the ASA ... appl[ies] to the *Brother Jonathan*," and thus, whether the district court had jurisdiction to proceed in the matter. *See* Pet. App. A24 & n. 3. After hearing all of the evidence, the district court found that *The Brother Jonathan* does not meet the ASA's criteria. Those factual findings were affirmed by the Ninth Circuit. Having lost, the State now complains that the district court violated the Eleventh Amendment *by deciding the very question placed in issue by the State*: whether the ASA applies here.

As noted above, the question of whether the ASA applies to *The Brother Jonathan* carries with it several significant consequences for the federal government and the federal courts alike: The ASA vests the federal government with title (at least initially) to all wrecks that fall within the purview of the Act; the federal admiralty laws of salvage and finds do not apply to such wrecks; and the federal courts have no admiralty *in rem* jurisidiction over them. Surely, the Eleventh Amendment does not deprive the federal courts of their power to determine the application of federal statutes — particularly where, as here, application of the statute carries with it so many important consequences for the federal government and the jurisdiction of the federal courts.

Because the holding of the district court, as affirmed by the Ninth Circuit, clearly does not run afoul of the Eleventh Amendment, no significant legal issue is presented and further review by this Court is unwarranted.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ELEVENTH AMENDMENT ISSUE DECIDED BELOW.

The State contends that there is a conflict among the circuits on the Eleventh Amendment issue decided below. However, that is not the case. *No circuits have endorsed the proposition taken by California here — i.e.*, that a state should be permitted to intervene into an *in rem* admiralty action, assert a bald and completely unsubstantiated claim to the vessel under the ASA, and thereby automatically divest the district court of its jurisdiction without any evidentiary showing that the wreck meets the criteria spelled out in the statute. Only two other circuits have addressed this issue since the enactment of the ASA: the Sixth Circuit in *Fairport International Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), and the Seventh Circuit in *Zych v. The Lady Elgin*, 960 F.2d 665 (7th Cir. 1992). The Sixth Circuit in *The Captain Lawrence* cited with approval the decision below and explicitly followed it. *See* 105 F.3d at 1083 (also indicating that there was no split in the circuits on this point).

The State makes much of a supposed conflict between the decision below and the Seventh Circuit's holding in *The Lady Elgin*. However, *The Lady Elgin* is clearly distinguishable from the instant case. In *The Lady Elgin*, the salvor specifically requested that the district court issue an order requiring that "all governments, governmental agencies, *and states* be required to show cause" why the salvor should not be awarded title. 960 F.2d at 667 (emphasis added). The State of Illinois (on whose submerged lands the wreck was located) intervened and moved to dismiss the case based on the Eleventh Amendment, or in the alternative, to exclude the State from the scope of any judgment.

Although the district court initially granted the State's motion and ruled that Illinois would be excluded from any judgment, the district court later held that the wreck was owned by a foundation established by the salvor and issued an injunction against Illinois to that effect. 960 F.2d at 668. The Seventh Circuit reversed the district court's order granting the injunction against the State, explaining that the Eleventh Amendment prohibits the federal courts from granting "relief against a state in its own name." 960 F.2d at 670. *However, the Seventh Circuirt specifically declined to hold that the entire action was barred by the Eleventh Amendment*, as advocated by the State here; the court simply struck down the injunction against Illinois, allowing the case to proceed in all other respects. 960 F.2d at 670.

In *The Lady Elgin*, the injunction requested by the salvor and issued by the district court specifically enjoined the State of Illinois, by name, from interfering with the salvor's title to, or possession of, the wreck. Thus, the injunction was clearly "against a state" for purposes of the Eleventh Amendment. By contrast, in the instant case DSR has never asked for an injunction against the State of California in its own name. Indeed, the injunction that was ultimately entered by the district court was narrowly crafted to enjoin only "competing salvors, would-be salvors, and divers." *See* Pet. App., at A62-A63. The State readily admits that it falls into none of those categories. Therefore, this is not an action "against the State" for purposes of the Eleventh Amendment and *The Lady Elgin* is distinguishable.[3]

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3. The State cites a case from the First Circuit, *Maritime Underwater Surveys, Inc. v. The Unidentified, Wrecked And Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983), as additional support for it argument that there is a conflict among the circuits with regard to application of the Eleventh Amendment in *in rem* admiralty cases. However, in that case, as in *The Lady Elgin*, the salvor asked the district court to issue an order requiring that "all

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states claiming an interest in the unidentified, wrecked and abandoned sailing vessel be cited to appear before this Honorable Court and show cause why possession should not be delivered to Plaintiff as having full title . . . ." 717 F.2d at 6-7. Because the salvor in *Maritime Underwater Surveys* sought an injunction against the State of Massachusetts, in its own name, the action was clearly "against a state" for purposes of the Eleventh Amendment. 717 F.2d at 8. *See also Fitzgerald v. The Unidentified, Wrecked And Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989) (though nominally an *in rem* action against a vessel, case was in fact "against a state" for purposes of the Eleventh Amendment where salvor prayed for an order enjoining the State from interfering with the salvage and ordering the State to show cause why title should not be vested in the salvor.). No such relief was requested against the State of California in this case.

Maritime Underwater Surveys is distinguishable from the instant case in several other important respects, as well. Most significantly, in that case it was *undisputed* that the vessel in question was both abandoned (it was a 200 year old pirate ship), embedded (it was buried beneath five feet of sand), and located on the State's submerged lands (less than 1/4 mile off the beach at Wellfleet, Massachusetts). 717 F.2d at 6. The First Circuit was careful to note that its holding was narrow and applies only to abandoned wrecks that are "*lodged within the seabed*" of a state's submerged lands. 717 F.2d at 8 (emphasis added). In the instant case, however, the district court found that the evidence clearly shows the *Brother Jonathan* is neither abandoned nor lodged in the seabed; and the Ninth Circuit declined to disturb those findings on appeal. Accordingly, the rule stated in *Maritime Underwater Surveys* is simply inapplicable on its face.

Finally, and perhaps most important, the First Circuit's decision in *Maritime Underwater Surveys* was rendered well before the effective date of the ASA. Like the Ninth Circuit's earlier decision in *Marx v. Guam*, 866 F.2d 294 (9th Cir. 1989) — which the Ninth Circuit in the instant case expressly disavowed as no longer controlling after the enactment of the ASA, *see Deep Sea Research*, 102 F.3d at 385-86; Pet. App. A10-A11 — the *Maritime Underwater Surveys* decision simply cannot be taken as an accurate statement of the law after the enactment of the ASA. Rather, the ASA can be seen only

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Even if the injunction issued by the district court in this case could somehow be construed as being "against the State" — such that the Seventh Circuit's decision in *The Lady Elgin* is pertinent — still there is no conflict between the holding in that case and the ruling below. The Seventh Circuit recognized that, even on the facts before it, "some view of the merits [of the state's claim] is inevitable" in determining whether the case is barred by the Eleventh Amendment. 960 F.2d at 670. That is all that occurred here — albeit in a factual context different from that presented in *The Lady Elgin*. In the instant case, unlike in *The Lady Elgin*, the issue was not whether the Eleventh Amendment bars a *specific injunction* admittedly issued against a state in its name, but rather whether an *in rem* action against a vessel is barred *in its entirety* as being an action "against a state." The district court and the Ninth Circuit found that this *in rem* action against *The Brother Jonathan* was not an action "against the State" of California because the State's claim to the wreck

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as a *reaction* to the confusing and often contradictory line of pre-ASA cases involving state control of abandoned shipwrecks. In enacting the ASA, Congress sought to clarify the law in this area once-and-for-all, and in a uniform way. *See* H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. I, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 366. Congress' solution was simple, and distinctively *federal*: The ASA vests the *federal government* with title (subsequently transferred to the states) to shipwrecks that meet the criteria set forth in the ASA, but provides that title to all other shipwrecks shall be governed by the *federal law* of salvage and finds.

This is not to say that the ASA in any way abrogates the states' Eleventh Amendment immunity. Rather, because the ASA sets forth the standards for determining title to shipwrecks, the Courts in post-ASA cases must now look to those standards in deciding whether an *in rem* action against a wreck is in fact an action "against a state" barred by the Eleventh Amendment. *See Deep Sea Research*, 102 F.3d at 387; Pet. App. A11 & A14 n. 5. Thus, the analysis followed in *Maritime Underwater Surveys* — a pre-ASA case — is no longer pertinent.

was predicated upon the ASA, and the evidence indicated overwhelmingly that the wreck does not meet *any* of the requirements set forth in the ASA. Thus, there is no conflict between the holding below and the Seventh Circuit's decision in *The Lady Elgin*.

To the extent that *The Lady Elgin* and the decision below can be construed as conflicting in any respect, the state of the record below makes this case unsuitable for resolving that conflict. The State of California intervened below, asserting that it owns *The Brother Jonathan* under the ASA and California Public Resources Code section 6313. However, the State completely failed to present *any* probative evidence showing that *The Brother Jonathan* meets *any* of the criteria set forth in the ASA or section 6313. In fact, DSR presented compelling, undisputed evidence that *The Brother Jonathan* does not meet any of the criteria of the ASA or section 6313: it is not abandoned, not embedded in the sea floor, and (at least at the time of the district court's ruling) not listed in or determined eligible for listing in the National Register of Historic Places.

In light of the record below, a ruling for the State in this case would require the Court to hold that a state can intervene in any *in rem* action, assert a bald and completely unsubstantiated claim to the property that is the subject of the action, and thereby automatically transform the case into an action "against the State" barred by the Eleventh Amendment, divesting the district court of its jurisdiction without permitting the district court to make any inquiry into the jurisdictional facts. If this Court were to adopt a rule requiring states in such circumstances to make anything *more* than a bald and completely unsubstantiated claim to the property, such a rule would not disturb the decision below.

III.

THE DECISION BELOW DOES NOT IMPLICATE ANY ISSUES OF SUCH NATIONAL IMPORTANCE AS TO MERIT A COMMITMENT OF THIS COURT'S TIME, ATTENTION, AND RESOURCES.

The State suggests that the decision below will have disastrous consequences for the efforts of California and other states to manage and protect "historically significant resources," and that the sky surely will fall unless this Court grants the petition. That is pure hyperbole. Any burdens faced by the states in this context have been imposed by *Congress* — which, in enacting the ASA, declared that states have title to *only those shipwrecks that meet the criteria set forth in the statute*. The fact that a state which intervenes in a federal *in rem* action and moves to oust the federal court of its jurisidction must first demonstrate that the particular shipwreck in fact meets the ASA criteria is hardly a novel concept; when a state moves to dismiss a case on the ground that it is barred by the Eleventh Amendment, the state has always been required to demonstrate, as a threshold matter, that the action is indeed one "against a state." *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1131 (1996).

Although in this case both the district court and the Ninth Circuit concluded that California had not sustained its burden of proving that *The Brother Jonathan* meets the ASA criteria (leading to the conclusion that this is not an action "against a state"), there is no reason to believe that this burden will prove to be unduly onerous to the states in most instances. For instance, in *Fairport International Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), the Sixth Circuit adopted the rule of law followed in the instant case, but reached a different conclusion on the facts — finding that the State of

Michigan had demonstrated that the wreck in that case meets the criteria set forth in the ASA.

To the best of Respondent's knowledge, this is the only case in which a federal court has decided that a state has not made a sufficient claim to a shipwreck under the terms outlined in the ASA. In all other post-ASA shipwreck cases, federal courts determined their own jurisdiction to decide a state's claim of Eleventh Amendment immunity, and then promptly dismissed the case when the state came forward with the necessary showing. Because the decision below rests upon California's complete failure to demonstrate that *The Brother Jonathan* meets any of the criteria set forth in the ASA, its import is limited to its facts. For this reason, certiorari should be denied. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1950) ("This Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants.").

IV.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE ASA PREEMPTS CALIFORNIA PUBLIC RESOURCES CODE SECTION 6313.

Throughout this litigation, California has asserted two separate statutory bases for its alleged claim to *The Brother Jonathan*: the ASA and California Public Resources Code section 6313. However, those two statutes clearly conflict with one another.

In enacting the ASA, Congress sought to clarify — once and for all, and in a nationally-uniform way — the considerable uncertainty and inconsistencies that had existed with regard to title to abandoned shipwrecks. *See* H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. I, at 2 (1988), reprinted in 1988

U.S.C.C.A.N. 365, 366 (noting that, "There is currently confusion over the ownership and authority to manage abandoned shipwrecks .... Twenty-seven states have passed legislation concerning historic shipwrecks. Recent court cases have put in question the validity of these various laws."). The ASA accomplishes that purpose by creating a specific, narrowly-defined class of shipwrecks, and declaring that the federal government shall have title to shipwrecks falling within that class (a title which is subsequently transferred to the states in whose waters the wrecks are located). The ASA specifically provides that shipwrecks which do not meet the requirements set forth in the statute shall continue to be subject to the exclusive admiralty jurisdiction of the federal courts, and title to those shipwrecks shall be decided in accordance with federal maritime law. *See* 43 U.S.C. § 2106(b), which provides that the ASA "shall not change the laws of the United States relating to shipwrecks, other than those to which it applies." *Id.* Congress, in passing the ASA, made this abundantly clear. Once again, the legislative history notes that it is Congress'

> inten[t] to carve out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies. All other shipwrecks ... remain subject to the uniform principles of admiralty law, except as may be provided in other *federal* law.

House ASA Report at 8, 1988 U.S.C.C.A.N. at 377 (emphasis added). The House Report does not provide (as the State of California might wish) that state law would also apply, where the ASA does not.

In enacting California Public Resources Code section 6313, the State seeks to claim title to a much broader class of shipwrecks than those defined in the ASA. Whereas the ASA is

limited to abandoned shipwrecks that are either "embedded" in the sea floor or listed in the National Register of Historic Places, section 6313 purports to vest California with title to *all* shipwrecks on State submerged lands for more than 50 years — whether or not abandoned, embedded, or listed in the National Register. Both the district court and the Ninth Circuit correctly discerned that such state legislation would entirely frustrate Congress' stated goal of a final, nationally-uniform disposition of title to abandoned shipwrecks, and would upset the delicate balance of competing interests that Congress created when it defined a specific, limited class of shipwrecks to convey to the states. Indeed, as made clear by the legislative history cited above, the ASA was enacted precisely for the purpose of eliminating the confusion and uncertainty created by a maze of differing state legislation regarding shipwrecks.

Not only does section 6313 frustrate Congress' purpose in enacting the ASA, but it also plainly conflicts with the ASA in several important respects. First, the ASA begins from the premise that the *federal government* has title to shipwrecks meeting the criteria spelled out in the Act. *See* 43 U.S.C. § 2105(a). The states obtain title to such shipwrecks only by grant from the federal government. *See* 43 U.S.C. § 2105(c). Section 6313 plainly conflicts with the ASA, in that it purports to vest California with title to those same shipwrecks in its own right and by its own legislative *fiat* — when the federal government has asserted its original title to such shipwrecks pursuant to the ASA.

Furthermore, section 6313 also conflicts with the ASA to the extent that it purports to vest the State with title to shipwrecks that do not meet the criteria spelled out in the ASA. The ASA specifically provides that questions of title with regard to shipwrecks not encompassed by the ASA will continue to be governed by traditional federal maritime law — not by state

law. Simply put, Congress has spoken on the question of defining the class of shipwrecks to which the states may make legitimate claims of title. The State of California cannot now baldly assert that the ASA did not mean what it said in limiting that class to abandoned and embedded wrecks and that "[t]his Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies." *See* 43 U.S.C. § 2106(b).

Apparently attempting to re-write the Court of Appeals' decision in order to provoke certiorari, the State suggests that the appellate court's preemption analysis was based on an erroneous assumption that federal admiralty courts have exclusive jurisdiction to decide questions of maritime law. That is a classic "straw man" fallacy. A simple examination of the holding below makes clear that the appellate court concluded that section 6313 is preempted *by the ASA* — not by some vague notion of supposedly exclusive federal jurisdiction over questions of maritime law. *See Deep Sea Research*, 102 F.3d at 384; Pet. App. A7-A9. Intentionally or unintentionally, the State's petition completely mischaracterizes the Court of Appeals' preemption analysis.

The Court of Appeals did not err in holding that California Public Resources Code section 6313 is preempted to the extent that it purports to vest the State with title to shipwrecks that do not meet the requirements set forth in the ASA. No other court has taken a position contrary to that held below. Accordingly, no substantial question is presented for this Court in that regard.

V.

WHETHER *THE BROTHER JONATHAN* IS ABANDONED IS A QUESTION OF FACT UNSUITABLE FOR REVIEW BY THIS COURT.

With respect to the State's third "question presented," it is manifest that the State is simply seeking Supreme Court review solely in order to dispute factual findings made and affirmed below.[4] It is well-established that whether a vessel has been abandoned is a question of fact to be reviewed by the courts of appeal for clear error only. *See The Captain Lawrence*, 105 F.3d at 1082; *Columbus-America Discovery Group*, 974 F.2d at 467. Whether a vessel is embedded in the sea floor is also a question of fact. *See The Seabird*, 941 F.2d at 530.

After hearing all of the evidence, the district court below held that *The Brother Jonathan* is not abandoned and is not embedded in the sea floor. The Ninth Circuit expressly affirmed the finding of non-abandonment, and left undisturbed the finding of non-embeddedness. This Court has frequently held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Indeed, this Court's own rules make clear that a petition for writ of certiorari should not be granted where, as here, the alleged error consists of an assertedly erroneous factual finding. *See* S. Ct. R. 10.

4. Petitioner's intimation, Pet. 20, that the Ninth Circuit's decision, to treat the *Brother Jonathan* as a unified *res*, is in conflict with the Fourth Circuit's opinion in *Columbus-America Discovery Group* is purely fanciful. Even a superficial reading of the *Columbus-America* decision indicates that that court there extended every evidentiary presumption so that the property found on board that wreck would be treated in a unified fashion. *See* 974 F.2d at 464-465 and n. 6.

Undeterred, Petitioner seeks to create the appearance of a legal issue (ostensibly worthy of review of this Court) by suggesting that there is a split among the circuits as to the meaning of abandonment under the Abandoned Shipwreck Act. In making this argument, Petitioner is apparently conceding what it had refused earlier in its Petition to admit: that the ASA *is*, after all, relevant to a state's claim of ownership of a shipwreck.

In any event, the alleged circuit conflict is illusory. Petitioner contends that the district court and the Ninth Circuit below committed an error of law in holding that abandonment cannot be found except by the owner's express renunciation of title. Petitioner contends that this alleged error was shared by the Fourth Circuit in *Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 974 F.2d 450 (4th Cir. 1992). In fact, neither the courts below nor the Fourth Circuit in *Columbus-America Discovery Group* required an express renunciation of title as a prerequisite to establishing abandonment.

The ASA does not define "abandonment." Therefore, both the district court and the Ninth Circuit below applied the traditional definition of abandonment, long-established under the general maritime law, pursuant to which abandonment can be established *either* by demonstrating that the original owner affirmatively renounced title, *or* by proof of circumstances giving rise to an *inference* of abandonment. *See* the Ninth Circuit's opinion below, at Pet. App. A16 (quoting the district court's holding below). This is the same standard that was applied by the Fourth Circuit in *Columbus-America Discovery Group*, which also recognized that abandonment can be established by inference. *See Columbus-America Discovery Group*, 974 F.2d at 461-462 and 464-465 (recognizing that shipwrecks may be inferred to be abandoned under certain circumstances). This standard has been embraced by every circuit. There is no "split" in that regard.

In fact, the State's real complaint here is not with any alleged legal error or conflict among the circuits, but with the *factual findings* of the courts below — both of which held that the facts of this case do not support an inference of abandonment. That factual finding is not appropriate for review by this Court.

Petitioner also excoriates the Ninth Circuit's holding that the wreck of *The Brother Jonathan* should be treated as a unified *res* for the purpose of determining whether it is abandoned. Petitioner suggests that this approach differs from the approach taken in *Columbus-America Discovery Group*, where the Fourth Circuit concluded that part of a wreck may be abandoned, while other parts may be non-abandoned. However, *Columbus-America Discovery Group* was not an ASA case. Thus, unlike here, the abandonment issue in that case did not carry with it any jurisdictional consequences. The Ninth Circuit below wisely decided that, in an ASA case, the shipwreck must be deemed either entirely abandoned or entirely non-abandoned. To hold otherwise would be to permit the possibility that part of the wreck could be governed by the ASA (and thus subject to state jurisdiction), and part governed by federal maritime law (and thus subject to jurisdiction of the federal courts). Such conflicting and overlapping jurisdiction would prove completely unworkable in practice. Because *Columbus-America Discovery Group* was not an ASA case, those considerations were not an issue there. Thus, there is no "conflict" between the holdings below and the Fourth Circuit's decision in *Columbus America Discovery Group*, because that case is clearly distinguishable.

Once again, however, Petitioner's real complaint is not with any legal principles applied by the courts below, or any alleged "circuit split" with regard to those legal principles. Petitioner has made clear from the beginning of this litigation that it demands complete and exclusive control of *The Brother Jonathan*, in its entirety. Petitioner's interests would not be

satisfied in any way were this Court to hold that the courts below should have applied the "partial abandonment" approach adopted by the Fourth Circuit in *Columbus-America Discovery Group*. Such a ruling would resolve nothing; Petitioner would still be stuck with the lower courts' factual finding that at least some parts of the wreck are not abandoned. It is that factual finding which is the true object of Petitioner's ire. However, this Court is not in the business of reversing factual findings made by a district court and affirmed by a court of appeal.[5]

CONCLUSION

Because both the district court and the Ninth Circuit correctly concluded that this *in rem* action is not an action "against a State," the Eleventh Amendment does not apply here and there was no error below. Accordingly, no significant legal issue is presented for review by this Court. Contrary to the petitioner's suggestion, there is no conflict between the holding below and the Seventh Circuit's holding in *The Lady Elgin*, or the Fourth Circuit's holding in *Columbus-America Discovery Group*, as those cases are clearly distinguishable. Finally, because the decision below turns on its unique facts, it sets no sweeping precedent and implicates no issues of national importance warranting review by this Court. Accordingly, and for each of these reasons, Respondent Deep Sea Research, Inc. respectfully requests that the petition for writ of certiorari be denied.

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5. Petitioner suggests that the Ninth Circuit's ruling mandates that an entire wreck be found non-abandoned — and thus, outside the purview of the ASA — even if only a tiny portion of its cargo is non-abandoned. In fact, however, that is not the case presented here, and the Ninth Circuit wisely "reserve[d] the question of whether there is some point at which the portion of the wreck that is [non-abandoned] becomes so negligible that the wreck might be considered aoandoned for the purposes of the ASA." Pet. App. A19. Because that issue was not decided below, it should not be decided here.

Respectfully submitted,

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APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED JULY 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 91-3899 LCB

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant,

and

THE STATE OF CALIFORNIA, STATE LANDS COMMISSION, and the UNITED STATES OF AMERICA,

Intervening Defendants.

MEMORANDUM AND ORDER

BECHTLE, J. JULY , 1995

Presently before the court is intervening defendant, the State of California, State Lands Commission's ("State"), motion to stay the court's Orders of March 15, 1995, as amended on May 4, 1995, and April 5, 1995, pursuant to Rule 62(d) of the Federal

Rules of Civil Procedure. The State has requested that the court stay these orders pending the State's appeal of the court's denial of its motion to dismiss plaintiff Deep Sea Research, Inc.'s ("DSR") admiralty *in rem* action against defendant, the wreck of the *Brother Jonathan*, her appurtenances, furniture and cargo (collectively "*Brother Jonathan*"). For the reasons set forth below, the State's motion will be denied.

I. BACKGROUND

The State's motion for a stay of the court's orders pending appeal represents the latest chapter in a saga which began with the sinking of the steamer *Brother Jonathan* on July 30, 1865. On that day, the *Brother Jonathan* sank in a storm off the coast of Crescent City, California, with the loss of 147 passengers and crew. Legend has it that the *Brother Jonathan* was carrying a shipment of gold coin and specie bound for the Northwest Territories.[1] The ship came to rest in 250 feet of water, where it remained undisturbed for 128 years.

In October 1993, DSR located the wreck of the *Brother Jonathan* using sophisticated sonar and diving equipment. The company promptly filed an admiralty *in rem* action stating a

1. Recent newspaper articles have reported that the *Brother Jonathan* was rumored to be carrying a shipment of $2 million in gold (1865 valuation) and a $250,000 payroll for the U.S. Army (also 1865 valuation). (Pl.'s Br. in Support of Mot. for Issuance of Warrant of Arrest, Ex. A.) DSR's treasurer and director, David L. Flohr, estimates that the present-day value of the *Brother Jonathan's* cargo is between $25 million and $50 million. (Flohr Decl. ¶ 9.) Other commentators have estimated that the value of the ship's cargo could be as high as $108 million. *See* Robert Miller, *Charting the Future of Historical Shipwreck Legislation in California: Application of the English Model in the Salvage of the Brother Jonathan*, 17 Hastings Int'l & Comp. L. Rev. 793, 794 n. 7 (1994).

maritime claim against the vessel under Federal Rule of Civil Procedure 9(h) and 28 U.S.C. § 1333. DSR is seeking an award of title to the *Brother Jonathan* and its cargo under the common law of finds or, alternatively, to a salvage award under the common law of salvage. As the 130th anniversary of the ship's sinking approaches, the State and the United States government have come forward to assert claims of ownership against the ship and her purportedly valuable cargo.

Shortly after DSR filed its admiralty *in rem* action, the State intervened in the lawsuit and filed a motion to dismiss DSR's claim against the *Brother Jonathan* on procedural grounds. In support of its motion to dismiss, the State claimed that DSR's *in rem* action against the vessel was really an action against the State because the State had a possessory interest in the *Brother Jonathan* under the federal Abandoned Shipwreck Act ("ASA"), 43 U.S.C. § 2101, *et seq.*, and the California Shipwreck and Historic Maritime Resources Act ("SHMRA"), §§ 6309, 6313 and 6314 of the California Public Resources Code. The State further claimed that DSR's action against it was prohibited by the Eleventh Amendment, and the district court lacked jurisdiction to adjudicate the merits of any parties' claim to the vessel because the State refused to waive its right to sovereign immunity.

In September 1994, the court held two evidentiary hearings to determine whether the ASA and SHMRA applied to the *Brother Jonathan*, and whether the court had jurisdiction to proceed with this matter. The State submitted testimony and documentary evidence at the hearings to support its claim that the *Brother Jonathan* is an abandoned, historic shipwreck, embedded in the subsurface of the State's territorial sea, and eligible for listing in the National Register of Historical Places ("National Register").

Appendix A

On March 15, 1995, the court issued a detailed, comprehensive Memorandum and Order, including findings of fact and conclusions of law, denying the State's motion to dismiss. *See Deep Sea Research v. The Brother Jonathan*, 883 F. Supp. 1343 (N.D. Cal. 1995). The court found as, a matter of law, that the California SHMRA is preempted by the ASA, insofar as the SHMRA grants the State a possessory interest in, and regulatory authority over, shipwrecks that do not qualify for coverage under the ASA. *Deep Sea Research*, 883 F. Supp. at 1357-59. In addition, after carefully weighing all of the admissible evidence presented at the evidentiary hearings, the court found that the ASA did not apply to the *Brother Jonathan*. *Id.* at 1351-57. The court found that the State failed to establish the factual basis for the ASA's application; *i.e.*, that the *Brother Jonathan* is abandoned and embedded in the subsurface of the State's territorial sea, or that it is abandoned and the Secretary of the Interior has determined that the vessel is eligible for listing in the National Register.[2] *Id.* Moving on to DSR's claim against the vessel, the court found that the conditions for an action *in*

2. In reply brief dated July 3, 1995, the State asserted that the court did not make any factual findings that the *Brother Jonathan* is not abandoned or embedded. This assertion is incorrect. For the purpose of determining the applicability of ASA, and hence whether the court had jurisdiction to proceed with this case, the court first had to determine whether the *Brother Jonathan* met the finite criteria set forth in the ASA — that is, whether the *Brother Jonathan* was in fact abandoned and embedded, or abandoned and eligible for listing in the National Register. The "colorability" of the State's claim to the vessel is predicated upon the applicability of the ASA. If the ASA applies, title to the vessel is vested in the State pursuant to 43 U.S.C. § 2105(c). If the ASA does not apply, the State has no claim, colorable or otherwise, to the *Brother Jonathan*. Since the court found that the *Brother Jonathan* does not meet the factual prerequisites of the ASA, title to the *Brother Jonathan* has not been transferred to the State under the ASA, DSR's action against the vessel is not an action against the State, and the Eleventh Amendment does not apply.

Appendix A

rem appeared to exist under Supplemental Admiralty and Maritime Claims Rule C(1). *Id.* at 1359-61. The court entered a separate order authorizing the issuance of a warrant of arrest of the *Brother Jonathan*, and appointed DSR substitute custodian of the vessel in the place of the U.S. Marshal. *Id.* at 1364.

On April 5,1995, the court entered a preliminary injunction appointing DSR exclusive salvor of the *Brother Jonathan*, protecting DSR's continued right to exclusive possession of the *Brother Jonathan*, and protecting DSR from interference from rival salvors. *Id.* at 1361-63. All competing salvors, would-be salvors, or divers, were enjoined from conducting salvage operations or collecting artifacts within an are described as a circle having a radius of 5,200 feet (*i.e.*, a diameter of 10,400 feet), having as its center point a specific geographic coordinate. *Id.*

On May 4, 1995, the court amended its March 15, 1995 Order to appoint DSR substitute process server in the place of the U.S. Marshal. DSR was ordered to serve the warrant of arrest upon the vessel, and to procure insurance to protect the Marshal and DSR from any liability assumed in arresting the vessel and maintaining artifacts recovered from the vessel in the court's custody.

The State has never moved the court to reconsider any of its previous orders. Instead, on April 13,1995, the State filed a notice of appeal of the court's March 15, 1995 Order denying this motion to dismiss.On June 8, 1995, the State filed the instant motion for a stay of the court's Orders of March 15, 1995, as amended on May 4, 1995, and April 5, 1995, insofar as these orders permit DSR to engage in salvage activities at the wreck site, pending the outcome of the State's appeal.

The State contends that its "major concern" and purpose in requesting a stay of the court's order is to "protect and preserve the shipwreck by maintaining the status quo" while the Ninth Circuit considers the merits of its appeal. (State's mem. in Support of Mot. for Stay, at 2.) The State argues that there is a strong likelihood that it will succeed on the merit of its appeal because it believes that it has demonstrated a "colorable claim" to the *Brother Jonathan* under *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989), a pre-ASA case which the State contends is the law of the circuit. The State also argues that it will be irreparably injured if the court's orders are not stayed because "[p]ermitting salvage activity would be a disaster second only in magnitude to the sinking of the ship." (*Id.* at 4.) The State further argues that permitting salvage operations would harm the public's interest because DSR lacks the funds to perform a proper archaeological recovery operation "under an appropriate research design and by a qualified marine archaeologist." (*Id.* at 4-5.) Finally, the State argues that it should not be required to post a supersedeas bond under Rule 62(d) because a bond is only required to protect a money judgment, which does not exist in this case.

DSR vigorously opposes the imposition of a stay of the court's orders pending the State's appeal. DSR argues that the State has not made a strong showing of the likelihood of success on the merit of its appeal. DSR further argues that the interests of DSR and the public will be irreparably injured if a stay is implemented because there is a very acute possibility that the *Brother Jonathan* will be pillaged by competing salvors or unscrupulous divers during the time that the Ninth Circuit will taken to consider the State's appeal. DSR has also pledged to conduct its salvage operations pursuant to an appropriate research design and under the supervision of a qualified marine

archaeologist. To this end, DSR has retained James R. Reedy, Jr., a qualified marine archaeologist, and his company, R2 Underwater consultants, to design its salvage plan and oversee salvage operations.[3] Finally, DSR argues that, if the court is inclined to grant a stay, the court should require the State to post a bond in an amount equal to DSR's expenditures to date, as well as the value of any gold that may be recovered from the *Brother Jonathan*.

For the reasons set forth below, the court finds that the State has failed to demonstrate that a stay of the court's orders is warranted. To the contrary, the State's chances of success on appeal are minimal, and now that the circumstances of the value, location and accessibility of the wreck have been widely publicized, there is dangerous probability that the interests of DSR and the public will be irreparably harmed if DSR does not immediately begin salvage operations to eliminate the possibility that the wreck will be plundered.

II. STANDARD FOR ISSUING A STAY PENDING APPEAL

Under Rule 62(d) of the Federal Rules of Civil Procedure, when an appeal is taken from a final order or judgment of the district court, an appellant, upon the filing of a supersedeas bond, may seek a stay of the district court's order pending appeal. Fed. R. Civ. P. 62(d). In determining whether to issue a stay pending appeal, the district court may consider the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

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3. DSR submitted copies of Reedy's resume and preliminary salvage plan as exhibits to its response to the State's motion for a stay pending appeal.

(2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). For stay to issue, each of these elements must be proven independently. *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549 (9th Cir. 1977). Therefore, a showing of a likelihood of irreparable injury to the appellant will not suffice if it is unlikely that the appellant will not succeed on the merit of his appeal. *Gribble*, 565 F.2d at 551.

III. DISCUSSION

A. The State Has Not Demonstrated A Likelihood Of Success On The Merits Of Its Appeal

In support of its motion for a stay of the court's orders pending appeal, the State has simply restated the same legal arguments that it submitted in support of its earlier motion to dismiss without offering any new or different legal authority or evidence to persuade the court that its earlier ruling was incorrect. The court has already examined and rejected each of the State's arguments, and it will not, except where necessary, repeat its reasoning for doing so in this opinion. There are, however, two arguments advanced by the State which the court will address in further detail.

First, the State has renewed its earlier argument that the court violated the Eleventh Amendment by forcing the State to prove the factual prerequisites of the ASA. Once again, the State is incorrect. Under the most basic tenants of our legal system, a moving party is required to prove that it is entitled to the relief that it seeks. In this case, the State intervened in DSR's action

to challenge the court's jurisdiction; therefore, the court was required to determine whether the State's claim that the ASA divested the court of jurisdiction was valid.

Additionally, it is important to note that the court *lowered* the evidentiary threshold that was necessary for the State to prove that the ASA applied to the *Brother Jonathan*. Under traditional principles of admiralty law, abandonment must be proven by "strong and convincing evidence." *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461-65 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1625 (1993). In this case, however, the court lowered the standard of proof to a preponderance of the evidence for the purpose of its evidentiary hearings. Even under this relaxed standard of proof, the State was unable to provide sufficient credible, admissible evidence to establish that either the original owners of the *Brother Jonathan* and its cargo, or the successors-in-interest to the insurance underwriters that paid claims for the loss of the vessel, have abandoned their ownership interests in the vessel or its cargo. Nevertheless, the State, unyielding in its belief that it should not have to prove *anything* to obtain the relief that it seeks, has appealed the court's findings. After reexamining its earlier ruling, the court is not persuaded that its decision will be overturned on appeal.

Second, the State has put additional emphasis on its earlier argument that the California SHMRA gives it a possessory interest in the *Brother Jonathan*. The court's earlier finding on this argument is worth repeating: the California SHMRA, insofar as it grants the State a possessory interest in, and regulatory authority over, shipwrecks that do not qualify for coverage under the ASA, is preempted by the ASA.

By enacting the ASA, Congress created a limited exception to the application of traditional admiralty law to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101. Under ASA, title to these shipwrecks was transferred to the states in or on whose submerged lands the shipwreck is located, and the states were given the authority to promulgate regulations to guarantee the public's right to access and recover these shipwrecks. 43 U.S.C. §§ 2103 and 2105. The ASA expressly states that all shipwrecks not covered by the Act shall remain subject to the laws of the United States. 43 U.S.C. § 2106. The California SHMRA, which was enacted one year after Congress enacted the ASA, goes far beyond the authority granted to the states to regulate access to abandoned shipwrecks. The California SHMRA grants the State title to *all* shipwrecks and artifacts resting in State waters for more than fifty years, regardless of whether these ships have been abandoned by their owners. To the extent that the California SHMRA attempts to usurp matters specifically preserved within the exclusive jurisdiction of federal admiralty law by claiming an ownership interest in, and regulatory authority over, shipwrecks that are not covered by the ASA, it is preempted.

B. The State Has Not Demonstrated It Will Suffer Irreparable Injury If A Stay Is Not Granted

The State contends that it will be irreparably injured if the court's orders are not stayed because "[p]ermitting salvage activity would be a disaster second only in magnitude to the sinking of the ship." (State's Mem. in Support of Mot. for Stay, at 4.) This argument is disingenuous.

First by its own admission, the State has been issuing

permits to salvage the *Brother Jonathan* since at least 1969. (State's Reply Br. to DSR's Mot. for Issuance of Warrant of Arrest, at 4.) It is difficult to imagine why DSR's court-supervised salvage of the *Brother Jonathan*, as opposed to a State-supervised salvage, would be as disastrous as the loss of 147 lives in thunderous sea.

Second, contrary to the State's assertion, DSR is not about to tear down the pyramid to plunder the pharaoh's tomb. DSR has committed itself to conducting its salvage operations in an archaeologically sound manner, under the on-site supervision of a qualified, experienced marine archaeologist, and in accordance with a detailed salvage plan designed to maintain the historical value of the vessel. According to the salvage plan submitted to the court, the *Brother Jonathan* will be thoroughly mapped and photographed prior to the removal of any artifacts, any artifacts recovered will be carefully preserved and stored, and DSR will make its collected data available to the public through publication in popular and scientific literature. (DSR's Resp. Br., Ex. B.) Moreover, the renewal of the court's preliminary injunction in 1996 and the amount of any recovery that DSR may ultimately receive as a salvage award, will be contingent upon DSR's preservation of the historical and archaeological value of the *Brother Jonathan* and its cargo. *See Deep Sea Research*, 883 F. Supp. at 1363.

Given the State's admission that it has been willing to permit salvage activities on the *Brother Jonathan* for more than 25 years, the question before the court is not whether to allow salvage activities at all, but whether DSR is able to carry out its salvage activities in an archaeologically sound manner. After carefully examining the entire record of this case, the court is satisfied that the State's avowed interest in preserving the

historical and archaeological integrity of the *Brother Jonathan* will not be irreparably injured if DSR is allowed to proceed with its salvage operations under the court's strict supervision.

C. DSR Will Be Irreparably Injured If The Court Grants A Stay Pending Appeal

DSR has objected to the court's issuance of a stay of salvage operations pending the State's appeal because DSR believes there is a substantial likelihood that the *Brother Jonathan* will be pillaged or even destroyed by unscrupulous divers or competing salvors while the parties await the outcome of the State's appeal. DSR's fear is well founded.

The approximate location of the *Brother Jonathan* is now a matter of public record. It has been described at length in the court's previous opinions, and the plaintiff's exclusive salvage area was outlined in the court's preliminary injunction. Moreover, DSR's exclusive salvage area is visible from shore. Additionally, DSR has submitted evidence that the discovery of the *Brother Jonathan* has attracted much attention in the salvage and technical diving communities, and many people in these communities believe that the wreck contains a significant quantity of gold or other treasures. (*See* DSR's Resp. Br., Ex. B at 5; Harrington Decl. at ¶¶ 5-6; Lawson Decl. at ¶ 3; Flohr Decl. at ¶¶ 7-9.) Due to recent advances in diving technology, the *Brother Jonathan* is readily accessible to virtually any experienced diver. (*See* DSR's Resp. Br., Ex. B at 5; Harrington Decl. at ¶ 6; Lawson Decl. at ¶ 2.) Finally, there is a history of archaeologically significant shipwrecks in California, including gold rush era shipwrecks, being destroyed by unscrupulous divers searching for treasure. (*See* DSR's Resp. Br., Ex. B at 5; Harrington Decl. at ¶¶ 7-8; Lawson Decl. at ¶¶ 3-8.)

In this case, the combination of access plus incentive creates an acute risk that the *Brother Jonathan* will be pillaged by unscrupulous divers during the several months that this matter will be in limbo pending the outcome of the State's appeal. Under the circumstances, the best alternative is to allow DSR to begin salvage operations, establish a presence on the wrecksite, isolate and retrieve any valuable artifacts, and bring these artifacts into the custody of the court.[4] This will remove any incentive that exists for outsiders to plunder the wreck. Otherwise, if this matter is stayed pending the State's appeal and the wreck is pillaged or destroyed, all parties will suffer irreparable injury.

There is a second, independent basis for not granting the State's motion for a stay pending appeal. As first finder of the vessel, and by acting in good faith, DSR has earned the right to exclusive possession of the shipwreck and to be free from interference by rival salvors. *See Deep Sea Research*, 883 F. Supp. at 1362. DSR has expended many years and several hundred thousand dollars attempting to locate and recover the *Brother Jonathan*. Under the law of salvage, DSR is entitled to recover reasonable compensation for its investment of time, capital and industry. *See Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, — F.3d —, 1995 WL 354289 (4th Cir. June 14, 1995). If a stay is implemented, DSR will be forced to sit idle for several months, or even a year, without receiving any return on its investment. Although a salvor's expenses or expected return on investment are not ordinarily factors to be considered when determining whether the salvage

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4. DSR believes the *Brother Jonathan's* shipment of gold was carried in 13 Wells Fargo transfer boxes and the ship's safe. (DSR's Resp. Br., Ex. B at 2; Harrington Decl. at ¶ 5.) Once the shipwreck is thoroughly mapped and photographed, DSR intends to begin recovery of these items. (DSR's Resp. Br., Ex. B at 2, 5.)

services rendered are meritorious, *see Columbus-America*, 1995 WL 354289, *14, it would be inequitable for the court to consider granting a stay of its earlier orders without first considering the significant time and money expended by DSR to achieve its success to date. Based on the poor showing that the State has made throughout the course of this litigation, the court finds that DSR would be substantially harmed if it were divested of its right to exclusive possession of the *Brother Jonathan* and forced to wait another year before beginning its salvage operations.

D. The Public Interest Does Not Favor A Stay

The State contends that the public interest lies in preserving and protecting the historic cultural value of the *Brother Jonathan*, and that "maintaining the status quo" is the best way to protect the public's interest. While the court agrees with the State's first contention, it disagrees with the second.

First, "maintaining the status quo" does not favor the public interest because the *Brother Jonathan* will be salvaged by someone — if not by DSR, then by the State, a competing salvor, or by someone more concerned with a quick recovery of several million dollars than with preserving the historical value of the wreck. The shipwreck is allegedly worth tens of millions of dollars, it is resting just four miles off the coast, and its approximate location has been published across the nation in the Federal Supplement. It would be naive to think that the *Brother Jonathan* will not be the subject of attempts to raise her cargo if the court's orders are stayed for several months.

Second, staying the court's orders would have the practical effect of leaving the ship unguarded for nearly a year. DSR

cannot be expected to incur the expense of maintaining a 24 hour vigil over the wrecksite for months on end, and the State has not expressed a willingness to do so. Moreover, the State has argued that it should not be required to post a bond to secure against any potential loss that could be caused by the unauthorized salvage or destruction of the ship. Without adequate security, a stay of the court's orders cannot issue.

Finally, DSR has demonstrated that it is committed to preserving the archaeological and historical value of the ship, and to sharing whatever data or artifacts that it collects with the public. DSR has retained the services of a qualified, experienced marine archaeologist to plan and oversee its salvage operations, and it has pledged to conduct all of its operations with an eye toward gathering information to share with the public. All of the artifacts that have been recovered from the *Brother Jonathan* to date have been carefully stored and preserved in accordance with standard archaeological practices. Additionally, DSR is currently working with the Del Norte County Historical Society to publicly display these artifacts as part of a local celebration to commemorate the 130th anniversary of the sinking of the *Brother Jonathan* on July 30, 1995. (Harrington Decl. at ¶ 11.) DSR is also working with the Del Norte County Historical Society to arrange a permanent display of artifacts recovered from the *Brother Jonathan* in a local museum. (*Id.*)

In sum, the public cannot enjoy its interest in the *Brother Jonathan* unless the shipwreck is properly recovered and the ship's artifacts are properly preserved. DSR is ready, willing and able to carry out salvage activities that protect the interests of all parties. The court has not basis to find that DSR will not adequately safeguard the public interest during the course of its salvage operations. To the contrary, the court finds that an

immediate, professional, strictly supervised, and properly executed salvage operation conducted by DSR is the best alternative for protecting the public's interest, and that a stay of the court's orders will be harmful to the public.

E. The Court Will Not Grant A Stay To Give The State Additional Time To Seek The Inclusion Of The Brother Jonathan In The National Register

As an alternative basis for seeking the imposition of a stay, the State has requested that the court grant a stay of its earlier orders to give the State additional time to nominate the *Brother Jonathan* for inclusion in the National Register. The court will not grant a stay on this basis.

First, the *Brother Jonathan's* eligibility for listing in the National Register is speculative, at best. The State has not presented any convincing evidence to the court that the wreck meets the criteria for eligibility set forth in 36 C.F.R. § 60.4.

Second, although the State has had years to nominate the *Brother Jonathan* for inclusion in the National Register, it did not see fit to do so until after it filed its notice of appeal. Presumably, if the State's nomination is successful, the State will seek to reopen the record so it can bolster its argument that the court should not permit the salvage of an historically significant shipwreck, which is, or may be, a question left to another day.

Finally, assuming for the moment that the wreck is eligible for inclusion in the National Register, its listing at some future date would not change the outcome of the court's prior decision. Even if the *Brother Jonathan* is eligible for listing in the National

Register, the ASA would not apply to the vessel unless it was abandoned by its owner, and the court has already found that it was not. For all these reasons, the court will deny the State's request for a stay on this basis.

IV. CONCLUSION

For the reasons set forth above, the court finds that the State has failed to adequately demonstrate that a stay of the court's orders permitting DSR to salvage the *Brother Jonathan* is warranted pending the State's appeal of the court's March 15, 1995 Memorandum and Order denying the State's motion to dismiss DSR's admiralty *in rem* action against the *Brother Jonathan*. The State has not shown a sufficient likelihood of success on the merits of its appeal, nor has it shown that it will suffer irreparable injury if a stay is not issued. Consequently, the State's motion for a stay of the court's orders pending appeal will be denied.

An appropriate Order will be entered.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 91-3899 LCB

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant,

and

THE STATE OF CALIFORNIA, STATE LANDS COMMISSION, and the UNITED STATES OF AMERICA,

Intervening Defendants.

ORDER

AND NOW, this __ day of July, 1995, upon consideration of defendant, the State of California, State Lands Commission's ("State"), motion to stay the court's Order of March 15, 1995, as amended on May 4, 1995, and April 5, 1995, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, and plaintiff Deep Sea Research, Inc.'s response thereto, IT IS ORDERED that the State's motion is *denied.*

LOUIS C. BECHTLE, J.